

STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 18-83:

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO,

Complainant,

- vs -

FINAL ORDER

CITY AND/OR COUNTY OF BUTTE-SILVER
BOW and all representatives thereof;
DONALD R. PROPLES, CHIEF EXECUTIVE;
ROBERT BUTKOVICH, SHERIFF; and the
BUTTE-SILVER BOW LAW ENFORCEMENT
COMMISSION,

Defendants.

The Findings of Fact, Conclusions of Law and Recommended Order were issued
by Hearing Examiner Stan Gerke on February 5, 1985.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended
Order were filed by Defendants' representative Ross Richardson on February 22,
1985.

Oral argument was scheduled before the Board of Personnel Appeals on
Friday, April 12, 1985.

After reviewing the record and considering the briefs and oral arguments,
the Board orders as follows:

1. IT IS ORDERED that the Defendants' Exceptions to the Findings of Fact,
Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopts the Findings of Fact,
Conclusions of Law and Recommended Order of Hearing Examiner Stan Gerke as
the Final Order of this Board.

DATED this 29 day of April, 1985.

BOARD OF PERSONNEL APPEALS

By Alan L. Joseph
Alan L. Joseph
Chairman

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 18-83:

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES }
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Complainant, }

CITY AND/OR COUNTY OF BUTTE-
SILVER BOW and all represent-
atives thereof; DONALD R.
PEOPLES, CHIEF EXECUTIVE;
ROBERT BUTOROVICH, SHERIFF;
and the BUTTE-SILVER BOW LAW
ENFORCEMENT COMMISSION, }

Defendants. }

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
RECOMMENDED ORDER.

On December 15, 1983, the American Federation of State, County and Municipal Employees (the Union) filed an unfair labor practice charge with this Board alleging that the City/County of Butte-Silver Bow (the Employer) and certain of its officers were committing violations of Section 39-31-401(1) and (5) MCA. In essence the complaint alleged that the Employer had illegally refused to abide by the terms of the Parties' collective bargaining agreement by refusing to process a grievance filed by a member of the Union's bargaining unit. Specifically, a police officer, Gale Wood, who was terminated by the Employer, filed a grievance and sought to have it processed pursuant to the terms of the collective bargaining agreement. The Employer, upon receipt of the grievance, responded that the issue raised was not grievable, that the matter was outside the grievance process. The Union then filed these charges.

In its answer filed February 24, 1984, with the Board, the Employer denied any violation of the pertinent Sections of Title 39, Chapter 31 MCA relied on by the Union to bring its charges. Further, the Employer asserted that this Board lacks subject matter jurisdiction and should dismiss the

1 complaint. The Employer contended that since Gale Wood had
2 filed an action in District Court pursuant to Section 7-32-
3 4164 MCA, he had elected his remedy and the District Court
4 has exclusive jurisdiction in this matter.

5 This Board conducted an investigation in this matter
6 and issued an Investigation Report and Determination on
7 May 4, 1984. The Report reasoned that if the relevant
8 alleged facts (1) the grievant still wants to go to arbitra-
9 tion pursuant to the grievance procedure contained in the
10 Parties' collective bargaining agreement, and (2) the Employer
11 refuses to process the grievance, are proved or stipulated,
12 then it appears that appropriate order by this Board would
13 be one compelling the Employer to abide by the collective
14 bargaining agreement and go to arbitration. As to the
15 jurisdictional matter, the Report determined that the Em-
16 ployer could present its defense to this Board or to the
17 courts on judicial review pursuant to Section 2-4-204(2)
18 MCA. The Report ultimately found probable merit for the
19 charge and concluded that a hearing in the matter is appro-
20 priate.

21 A pre-hearing conference was conducted on September 26,
22 1984, in the Butte-Silver Courthouse Building, Butte, Montana,
23 at which time the Parties agreed not to hold a formal evident-
24 iary hearing and to submit the matter on briefs. The Parties
25 stipulated to the issue, the facts, the record and a briefing
26 schedule. The last document in this matter was received
27 December 17, 1984.

28 ISSUE

29 Whether the City and/or County of Butte-Silver Bow
30 violated Section 39-31-401 (5) MCA by its action of refusing
31 to process a grievance pursuant to the then existing collec-
32 tive bargaining unit?

STIPULATED FACTS

1. The City and/or County of Butte-Silver Bow (Employer) is a public employer and has recognized the American Federation of State, County and Municipal Employees, AFL-CIO (Union) as the exclusive bargaining representative for certain of its employees including police officers.

2. A collective bargaining agreement which contains a grievance procedure culminating in final and binding arbitration existed between the Parties at the time of Mr. Gale Woods termination.

3. Mr. Gale Wood was a police officer employed by the Employer and as subject to the terms of the then existing collective bargaining agreement.

4. The Police Commission of the City and/or County of Butte-Silver Bow terminated Mr. Gale Wood on September 27, 1983 for an alleged violation of Section 7-32-4155 (1)(b) MCA.

5. On October 11, 1983, Mr. Gale Wood filed a written grievance in a timely manner pursuant to the collective bargaining agreement concerning his termination.

6. The Employer refused to process the grievance filed by Mr. Gale Wood pursuant to the grievance procedure set forth in the collective bargaining agreement. By letter dated October 14, 1983, the Employer notified the Union that it viewed Mr. Wood's grievance to be outside the grievance process and not a grievable issue.

7. On October 21, 1983, Mr. Gale Wood filed an amended written grievance in a timely manner pursuant to the collective bargaining agreement concerning his termination and his right to grieve.

8. By letter dated October 28, 1983, the Employer notified the Union that its position was that Mr. Wood has

1 no grievance right and that District Court review was the
2 exclusive remedy available to Gale Wood.

3 RECORD

4 The Parties agree that the record in this matter shall
5 contain the collective bargaining agreement in existence at
6 the time of Mr. Gale Wood's termination.

7 DISCUSSION

8 The facts in this matter are clear: (1) a collective
9 bargaining agreement existed between the American Federation
10 of State, County and Municipal Employees, AFL-CIO (the
11 Union) and the City and/or County of Butte-Silver Bow (the
12 Employer), (3) the collective bargaining agreement contained
13 a grievance procedure culminating in final and binding
14 arbitration, (3) Mr. Gale Wood was a police officer employed
15 by the Employer and was subject to the collective bargaining
16 agreement, (4) Mr. Gale Wood filed a grievance in a timely
17 manner pursuant to the collective bargaining agreement, and
18 (5) the Employer refused to process the grievance pursuant
19 to the grievance procedure contained in the collective bar-
20 gaining agreement.

21 The refusal to process a dispute concerning a labor
22 contract, if it is in violation of the contract, is an
23 unfair labor practice recognized by the Montana Board of
24 Personnel Appeals, the State District Court and the Montana
25 Supreme Court. Board decisions: ULP #1-75, International
26 Brotherhood of Painters and Allied Trades, Local #1023 vs.
27 Montana State University and Barry Hjort; and ULP #3-76,
28 Local #521 of the International Association of Fire Fighters
29 v. City of Billings. District court decisions: Board of
30 Trustees of Flathead County School District No. 5 v. Board
31 of Personnel Appeals and AFSCME, Cause No. DV-80-600, Flathead
32 County; and City of Livingston v. Board of Personnel Appeals

1 and AFSCME, Cause No. 61-159, Park County, (1983). Montana
2 Supreme Court decision: City of Livingston v. AFSCME, et
3 al. 174 MT 421, 571 P.2d 374 (1977).

4 As was stated by the Montana Supreme Court in the City
5 of Livingston, supra, case:

6 Thus, by statute, the duty to bargain "in good
7 faith" continues during the entire course of the
8 contract.

9 (3) The Supreme Court has held that "Collective
10 bargaining is a continuing process. Among other
11 things it involves ** protection of employees
12 rights already secured by contract." Conley v.
13 Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L. Ed. 2d 80,
14 85 (1957). THE PROCESSING OF GRIEVANCES IN GRIEV-
15 ANCE HEARINGS IS COLLECTIVE BARGAINING. Tinken Rel-
16 ier Bearing Co. v. National Labor Rel. Bd., 161 F.
17 2d 949, 954 (6th Cir. 1947). In Ostrosky v.
18 United Steelworkers of America, 171 F. Supp. 782,
19 790 (D. Md. 1959), Aff'd, 273 F.2d 614 (4th Cir.
20 1960), cert. den., 363 U.S. 849, 80 S.Ct. 1628, 4
21 L.Ed.1d 1732 (1960), the court stated: "*** the
22 employer had the same duty to bargain collectively
23 over grievances as over the terms of the agreement."

24 (4) Under Montana's Collective Bargaining Act for
25 Public Employees a failure to hold a grievance
26 hearing as provided in the contract is an unfair
27 labor practice for failure to bargain in good
28 faith.

29 174 MT at 424,
30 571 P.2d at 377.

31 When a party to a collective bargaining agreement
32 refuses to abide by the mutually agreed-upon grievance
33 procedure, then that party is repudiating its statutory duty
34 to bargain in good faith, and is interfering with the rights
35 of employees guaranteed to them in Section 39-31-201 MCA.

36 The Board of Personnel Appeals recognizes the refusal
37 to abide by a contractual grievance procedure as an unfair
38 labor practice because such a refusal strikes at the very
39 heart of the purpose of the Act - to promote labor peace via
40 collective bargaining. Section 39-301-101 MCA.

41 The Employer presented two primary arguments in this
42 matter. First, the Employer argued that a threshold issue

existed: underlying the noted issue in this matter. The police officer, Gale Wood, was terminated for allegations of misconduct. The Employer argued that allegations of police officers' misconduct are properly addressed under Section 7-12-4155 MCA and not through a grievance procedure contained in a collective bargaining agreement:

7-32-4155. Role of police commission in hearing and deciding charges against policemen. (1) The police commission shall have the jurisdiction and it shall be its duty to hear, try, and decide all charges brought by any person or person against any member or officer of the police department, including any charge that such member or officer:

(a) is incompetent or has become incapacitated, by age, disease, or otherwise, to discharge the duties of his office;

(b) has been guilty of neglect of duty, of misconduct in his office, or of conduct unbecoming a police officer;

(c) has been found guilty of any crime; or

(d) whose conduct has been such as to bring reproach upon the police force.

(2) It is the duty of the police commission, at the time set for hearing a charge against a police officer, to forthwith proceed to hear, try, and determine the charge according to the rules of evidence applicable to courts of record in the state.

The Collective Bargaining Act for Public Employees (the Act) grants public employees the right "...to bargain collectively... on questions of wages, hours, fringe benefits, and other conditions of employment..." Section 39-31-201 MCA. The Employer's assertion in this matter that an employee's termination for reason of misconduct cannot be addressed through collective bargaining via a grievance procedure implies that public employees are limited to their rights under the Act. It is well settled that terminations and grievance procedures are negotiable subjects. See National Licorice Co. v. NLRB, 309 U.S. 350 6 LRRM 674 (1940) and NLRB v. Century Cement Mfg. Co., 208 F.2d 84, 33 LRRM 2063 (CA 2, 1953). This Board will not void or limit guaranteed collective bargaining rights.

1 Secondly, the Employer argued that the Union should not
2 be allowed two remedies to address the same issue. The
3 grievance procedure provides for final and binding arbitra-
4 tion and Section 7-32-4164 MCA provides for District Court
5 review:

6 7-32-4164. District court review. The
7 district court of the proper county shall have
8 jurisdiction to review all questions of fact and
9 all questions of law in a suit brought by any
10 officer or member of the police force, but no suit
11 to review such hearing or trial or for reinstatement
12 to office shall be maintained unless the same
13 is begun within a period of 60 days after the
14 decision of the police commission or order of the
15 mayor has been filed with the city clerk.

16 The Employer argued that both avenues should not be avail-
17 able to the Union - they should not have two bites from the
18 same apple. The Employer alleges that Section 7-32-4164 MCA
19 is the Union's exclusive remedy. The Board cannot agree
20 with the Employer's assertion of exclusivity because it
21 would limit the rights of public employees under the Collec-
22 tive Bargaining Act for Public Employees (see above discus-
23 sion).

24 The two remedies - final and binding arbitration and
25 Section 7-32-4164 MCA - may not be exclusive remedies. An
26 arbitrator chosen to hear Gale Wood's grievance may determine
27 that in fact Gale Wood was terminated for misconduct and
28 that issue would be properly addressed under Section 7-32-
29 4164 MCA. The arbitrator, in that case, has made a final
30 and binding determination in the matter in accordance with
31 the negotiated grievance procedure. Collective bargaining
32 rights have not been jeopardized and the Act has not been
violated. Other possible aspects of Gale Wood's grievance
such as back-pay, seniority rights or any other items which
may be at issue could be determined by the arbitrator if
under his authority to decide.

1 CONCLUSIONS OF LAW

2 The Defendants, City and/or County of Butte-Silver Bow
3 and all representatives thereof; Donald R. Peoples, Chief
4 Executive; Robert Butorovich, Sheriff; and the Butte-Silver
5 Bow Law Enforcement Commission have violated Section 39-31-401
6 (5) MCA.

7 RECOMMENDED ORDER

8 The Defendants shall immediately cease and desist from
9 refusing to bargain in good faith. The Defendants shall
10 immediately begin to process the grievance filed by Gale
11 Wood pursuant to the grievance procedure contained in the
12 collective bargaining agreement.

13 SPECIAL NOTE

14 Pursuant to ARM 24.26.684, the above RECOMMENDED ORDER
15 shall become the FINAL ORDER of this Board unless written
16 exceptions are filed within 20 days after service of these
17 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER
18 upon the parties.

19 DATED this 5 day of February, 1985.

20 BOARD OF PERSONNEL APPEALS

21
22 By: Stan Gerke

23 Stan Gerke
24 Hearing Examiner

25 CERTIFICATE OF MAILING

26 I, Stan Gerke, do certify that a
27 true and correct copy of this document was mailed to the
28 following on the 5 day of February, 1985.

29 Sharon Donaldson
30 Montana Council #9, AFSCME, AFL-CIO
31 789 Carter Drive
32 P.O. Box 5356
Helena, MT 59604

Ross Richardson
Chief Deputy County Attorney
Butte-Silver Bow Courthouse Building
155 West Granite Street
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